

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

No. 1:07-CR-107(2)

FILED: **9/10/10**
U.S. DISTRICT COURT
EASTERN DISTRICT COURT
DAVID J. MALAND, CLERK

United States of America

v.

Michael Jason Corbello
Defendant

**Report and Recommendation Re: Petition for Warrant
or Summons for Offender Under Supervision**

Pending is a “Petition for Warrant or Summons for Offender Under Supervision,” filed August 6, 2010, alleging that defendant violated conditions of supervised release. This matter is referred to the undersigned United States magistrate judge for review, hearing, and submission of a report with recommended findings of fact and conclusions of law. See United States v. Rodriguez, 23 F.3d 919, 920 n.1 (5th Cir. 1994); see also 18 U.S.C. § 3401(I) (2000); Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. The Original Conviction and Sentence

Defendant was sentenced on March 11, 2008, before The Honorable Thad Heartfield, U.S. District Judge of the Eastern District of Texas, after pleading guilty to the offense of possession of stolen mail matter, a Class D felony. This offense carried a statutory maximum imprisonment term of 5 years. The guideline imprisonment range, based on a total offense level of 13 and a criminal history category of VI, was 33 to 41 months. Defendant was subsequently sentenced to 37 months imprisonment followed by 3 years supervised release subject to the standard conditions of release, plus special conditions to include financial disclosure; no credit; no gambling; mental health aftercare; drug aftercare; alcohol abstinence; no contact with children under the age of 18 unless supervised by an adult approved by the probation officer; the defendant shall not possess or view any images in any form of media or in any live venue that depicts sexually explicit conduct, as defined in 18 U.S.C. Section 2256(2); \$5,436.88 in restitution; and a \$100 special assessment.

II. The Period of Supervision

On April 2, 2010, defendant completed his period of imprisonment and began service of the supervision term.

III. The Petition

United States Probation filed the pending Petition for Warrant or Summons for Offender Under Supervision on August 6, 2010. The petition alleges that defendant violated the following conditions of release:

Mandatory Condition: Defendant shall not commit another federal, state, or local crime.

Standard Condition: Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons.

Standard Condition: Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

Special Condition: Defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

As grounds, the petition alleges that defendant was arrested on or about July 20, 2010, by the Beaumont Police Department, Beaumont, Texas, for the offense of forgery. Defendant and three other individuals allegedly stole a box of checks from a mail box and attempted to cash one of the checks at Five Point Federal Credit Union in Beaumont. The petition also alleges defendant failed to maintain full-time employment while serving his term of supervised release. Finally, the petition alleges defendant failed to submit urine specimens on July 10 and 12, 2010, while participating in the random urinalysis testing program.

IV. Proceedings

On September 9, 2010, the undersigned United States Magistrate Judge convened a hearing pursuant to Rule 32.1, Federal Rules of Criminal Procedure, to hear evidence and argument on whether defendant violated conditions of supervised release. If so, the hearing would also consider the appropriate course of action.

At the revocation hearing, counsel for the government and the defendant announced an agreement as to a recommended disposition. Defendant would agree to plead “true” to the allegation that he violated a mandatory condition of supervised release by committing another offense. In exchange for defendant’s plea of “true,” the government agreed to decline to proceed with remaining alleged violations of supervised release conditions. Additionally, the government agreed defendant would not be prosecuted federally for the conduct described in allegation number one of the petition. Further, the parties agreed the court should revoke defendant’s supervised release and impose 24 months imprisonment, with no term of supervised release thereafter.

At the revocation hearing, defendant pleaded “true” to the allegation that he violated a mandatory condition of supervised release by committing another offense.

V. Principles of Analysis

According to Title 18 U.S.C. § 3583(e)(3), the Court may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the Court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release. The original offense of conviction was a Class D felony; therefore, the maximum term of imprisonment authorized under 18 U.S.C. § 3583(e)(3) is 2 years.

According to U.S.S.G. § 7B1.1(a), if the court finds by a preponderance of the evidence that defendant violated a mandatory condition of supervised release by committing another offense, defendant will be guilty of committing a Grade B violation. U.S.S.G. § 7B1.3(a)(1) indicates upon a finding of a Grade A or B violation, the Court shall revoke supervised release. U.S.S.G. § 7B1.4(a) provides that in defendant's case a revocation of supervised release based on a Grade B violation and a criminal history category of VI, the guideline imprisonment range is 21 to 24 months.

According to U.S.S.G. § 7B1.3(d), any restitution previously imposed in connection with a sentence for which revocation is ordered that remains unpaid at the time of revocation shall be ordered to be paid in addition to the sanction determined under U.S.S.G. § 7B1.4.

According to U.S.S.G. § 7B1.3(f), any term of imprisonment imposed upon revocation of supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

18 U.S.C. §§ 3583(e) and 3553(a) provide that in determining sentence, the court shall consider:

1. The nature and circumstance of the offense and the history and characteristics of the defendant; see 18 U.S.C. § 3553(a)(1);
2. The need for the sentence imposed to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, other corrective treatment in the most effective manner; see 18 U.S.C. §§ 3553 (a)(2)(B)-(D);

3. Applicable guidelines and policy statement issued by the Sentencing Commission, for the appropriate application of the provisions when modifying or revoking supervised release pursuant to 28 U.S.C. § 994(a)(3), that are in effect on the date the defendant is sentenced; see 18 U.S.C. 3553(a)(4); see also 28 U.S.C. § 924(A)(3);
4. Any pertinent policy statement issued by the Sentencing Commission, pursuant to 28 U.S.C. § 994(a)(2), that is in effect on the date the defendant is sentenced; see 18 U.S.C. § 3553(a)(5); and
5. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; see 18 U.S.C. § 3553(A)(6).

VI. Application

The undersigned has carefully considered each of the five factors listed in 18 U.S.C. §§ 3583(e) and 3553(a).

Findings:

Defendant pleaded “true” to the allegation that he violated a mandatory condition of supervised release by committing another offense. Based upon defendant’s plea of “true” to the allegations and U.S.S.G. § 7B1.1(a), defendant violated conditions of supervised release by failing to refrain from committing another federal, state, or local crime.

Conclusion and Justification:

Defendant’s violation is a Grade B violation with policy guidelines suggesting 21 to 24 months imprisonment upon revocation. Defendant has demonstrated inability to adhere to conditions of supervision. Defendant did not comply with conditions of his supervision by committing another offense

resembling his instant offense. As such, incarceration appropriately addresses defendant's violation. The sentencing objectives of punishment, deterrence and rehabilitation will best be served by a term of incarceration.

RECOMMENDATIONS

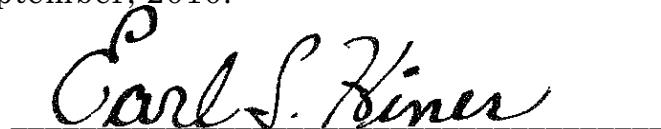
1. The court should find that defendant violated a mandatory condition of supervised release, by committing another offense, in the manner alleged in the petition.
2. The petition should be granted and defendant's supervised release revoked pursuant to 18 U.S.C. § 3565.
3. Defendant should be sentenced to a term of imprisonment of 24 months to run consecutively to any sentence of imprisonment defendant is serving.
4. Upon release of imprisonment, defendant should not be placed on supervised release.
5. Defendant should pay restitution in the amount of \$5,436.88 to Bobby Stratton. The restitution is due immediately, payable by cashier's check or money order, to the United States District Court and forwarded to the United States District Clerk's Office, Post Office Box 570, Tyler, Texas 75710.

OBJECTIONS

At the close of the revocation hearing, defendant, defense counsel, and counsel for the government each signed a standard form waiving their right to object to the proposed findings and recommendations contained in this report, consenting to revocation of supervised release as recommended herein, and consenting to the imposition of the above sentence recommended in this report. Defendant waived his right to be present and speak before the district judge

imposes the recommended sentence. Therefore, the court may act on the report and recommendation immediately.

SIGNED this 10 day of September, 2010.



Earl S. Hines
United States Magistrate Judge